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No. 307

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

LOUISIANA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
UNITED GAS PIPELINE COMPANY,
WILLMUT GAS AND OIL COMPANY,
Respondents

BRIEF OF THE STATE OF TEXAS AND THE RAILROAD COMMISSION OF TEXAS AS AMICI CURIAE

WAGGONER CARR
Attorney General of Texas

HAWTHORNE PHILLIPS
First Assistant Attorney General

T. B. WRIGHT
Executive Assistant

J. ARTHUR SANDLIN
Assistant Attorney General

LINWARD SHIVERS
Assistant Attorney General

C. DANIEL JONES, JR.
Assistant Attorney General
Box R, Capitol Station
Austin, Texas 78711

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On Writ of Certiorari from the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE STATE OF TEXAS AND THE RAILROAD COMMISSION OF TEXAS AS AMICI CURIAE

By this brief, the State of Texas and its duly authorized agency having jurisdiction within said state of the regulation of natural gas, the Railroad Commission of Texas, would urge as amici curiae and as Petitioner, Louisiana Public Service Commission, has urged in its brief previously filed herein, that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 6, 1966, covering three cases jointly argued and decided, to-wit: Louisiana Public Service Commission v. Federal Power Commission, No. 21705; Louisiana Gas Service Company v. Federal Power Commission, No. 21706; and Hammond-Baton Rouge

Brick Company, et al, v. Federal Power Commission, No. 21707. That Judgment denied three petitions to set aside an order of the Federal Power Commission, and, in effect, affirmed that order in which the Commission ruled that it, and not the Louisiana Commission, has jurisdiction to regulate natural gas sales by United Gas Pipeline Company to Louisiana distributors within a certain area of the State of Louisiana. This order of the Commission reverses in part the Initial Decision of the Commission's Presiding Examiner, sustaining Louisiana Commission jurisdiction over some of the sales in question.

Although the State of Texas is without the specific geographical area of involvement in the present litigation, both the State of Texas and the Railroad Commission of Texas are vitally concerned with the outcome of this case because the future existence of state regulatory processes over the natural gas industry and the very right of a state regulatory agency to regulate intrastate sales of natural gas are being severely threatened.

The State of Texas feels called upon herein to say that simply because gas produced, transported and sold within the State of Louisiana is "associated" in a pipeline with gas destined for use beyond said State does not make the sales of such intrastate gas "interstate" in character; and the State of Texas respectfully submits that Congress did not intend to give the Federal Power Commission unbounded power under the commerce clause of the Constitution, but intended only to fill a regulatory void in which, under certain early Supreme Court decisions, the states were constitutionally powerless to act.

In that connection, the State of Texas would direct the Honorable Court's attention to its own regulations set forth hereinbelow regarding its own intrastate sales of natural gas and further submits that the Opinions and Orders herein of the Federal Power Commission, which were subsequently affirmed by the Fifth Circuit Court of Appeals, go far beyond the "area which certain early Supreme Court decisions have held the states constitutionally powerless to regulate," and in fact cut deeply into the State's constitutional regulatory powers and specifically into the provisions and effect of Article 6053, et seq., Vernon's Civil Statutes of the State of Texas. Under Article 6053, V.C.S., intrastate sales of natural gas have been historically regulated within this State, to-wit:

> "The Commission after due notice shall fix and establish and enforce the adequate and reasonable price of gas and fair and reasonable rates of charges and regulations for transporting, producing, distributing, buying, selling, and delivering gas by such pipelines in this State;
>
> "And shall establish fair and equitable rules and regulations for the full control and supervision of said gas pipelines and all their holdings pertaining to the gas business in all their relations to the public, as the Commission may from time to time deem proper;
>
> "And establish a fair and equitable division of the proceeds of the sale of gas between the companies transporting or producing the gas and the companies distributing or selling it;
>
> "And prescribe and enforce rules and regulations for the government and control of such pipelines in respect to their gas pipelines and producing, receiving, transporting, and distributing facilities. . . ."

For the foregoing reasons, the State of Texas and the Railroad Commission of Texas are necessarily and deeply interested in these proceedings and would present the following argument in support of Petitioner, Louisiana Public Service Commission.

OPINIONS BELOW

The Initial Decision of the Presiding Examiner is reported at 30 F.P.C. reports 580, and the Opinion and Order of the Federal Power Commission is reported at 30 F.P.C. 560. The Opinion and Order of the Commission denying rehearing is reported at 31 F.P.C. 1152. The Opinion of the Court of Appeals (Brewster D.J.) is reported at 359 F. 2d 525. The foregoing opinions and orders, together with the Judgment of the Court of Appeals, appear in the Appendix to brief of Petitioner, Louisiana Public Service Commission, previously filed herein.

JURISDICTION

The Opinion of the Court of Appeals was filed on April 6, 1966, and the Judgment of the Court of Appeals was filed on May 2, 1966. The jurisdiction of this Court has been invoked under 28 USC 1254 (1).

QUESTION PRESENTED

Is a sale of natural gas, none of which has crossed or will cross a state line at any stage of its movement from well-head to ultimate consumption, a "sale in interstate commerce" within the meaning of the Natural Gas Act (15 USC 717 (b)) merely because such gas sold was transported to its point of sale and removed from the pipeline along with other gas that never has crossed but will cross a state line?

STATUTES INVOLVED

The statutes primarily involved are sections of the Natural Gas Act, 15 USC sections 717 (b), 717a(7) and 717r, which relate to jurisdiction conferred upon the Federal Power Commission, to the definition of "interstate commerce" and to judicial review of final orders. These statutes are also contained in the Appendix to the Louisiana Public Service Commission's brief previously filed herein.

STATEMENT

The sales under consideration are of natural gas transported through two main lies of United Gas Pipeline Company, a company which transports and sells gas from fields in several states including Texas and Louisiana, and are made at wholesale to Louisiana distributors in Eastern Louisiana. The aforementioned two main lines are the Napoleonville-Kosciusko Line and the Lirette-Mobile Line. All of the gas in the Lirette-Mobile Line is produced within the boundaries of the State of Louisiana. A substantial portion of gas in the Napoleon-Kosciusko Line is also produced within the boundaries of Louisiana, although a small amount thereof is produced in an area offshore from the Louisiana mainland (R. 88-89, 513).

The Presiding Examiner of the Federal Power Commission held that sales of gas from the Napoleonville-Kosciusko Line are sales in interstate commerce because some of the gas in the line originated in offshore fields and therefore at a point outside of the State of Louisiana. However, the Presiding Examiner further held that sales of gas from the Lirette-Mobile Line represent gas which is produced, transported and sold

within a state and are therefore not in interstate commerce and not subject to Federal Power Commission jurisdiction.

Notwithstanding the Opinion of the Presiding Examiner, both the Federal Power Commission and the Court of Appeals assumed that their respective decisions would be the same, even if all of the gas involved in the sales in question was produced within Louisiana's state boundaries, and respectively held and affirmed that the sales within the State of Louisiana by United Gas Pipeline Company from both lines are in interstate commerce and therefore subject to Federal Power Commission jurisdiction.

In that regard, the Federal Power Commission reversed the Presiding Examiner in part by a three-two decision and, upon application for rehearing, granted same and subsequently issued an additional three-two opinion and order upholding its original position. On separate petitions for review filed with the United States Court of Appeals for the Fifth Circuit by the Louisiana Commission, Louisiana Gas Service Company and Hammond-Baton Rouge Brick Company, et al, the Court of Appeals affirmed the Federal Power Commission's order solely on this Honorable Court's decision rendered in California v. Lo-Vaca Gathering Company, 379 U.S. 366, 85 S.Ct. 486, 13 L. Ed 2d 357 (1965) and F.P.C. v. Amerada Petroleum Corporation, 379 U.S. 687, 85 S. Ct. 632, 13 L.Ed. 2d 605 (1965).

The Louisiana Commission's petition for review of orders of the Federal Power Commission issued on August 26, 1963 and May 11, 1964 in Docket No. CP 62-161 was filed and docketed July 10, 1964 in the

United States Court of Appeals for the Fifth Circuit. Jurisdiction was invoked under the following provision of the Natural Gas Act: 15 U.S.C. 717r(b). The aforementioned opinions of the Federal Power Commission appear in the appendix to the Louisiana Public Service Commission's brief previously filed herein.

ARGUMENT

Since the question herein presented to the United States Supreme Court for the first time concerns whether state governments or the Federal Government should regulate sales of gas produced, transported, delivered and consumed entirely within one state, the State of Texas submits that the rights enjoyed by all gas-producing states, including the State of Texas, to protect the interests of their citizens in the maintenance of reasonable prices of natural gas are endangered by the decision rendered below. Never has the type of sales at issue herein been judicially questioned but rather has been historically regarded as an intrastate type of sale. One of the elements of production, transporation delivery and consumption traversed state boundaries in all of the following cases in point:

1. Illinois Gas Company v. Central Illinois Public Ser. Co., 314 U.S. 498, 62 S.Ct. 384, 86 L.Ed. 371 (1942),
2. Interstate Natural Gas Co. v. F.P.C., 331 U.S. 682, 67 S.Ct. 1482, 91 L.Ed. 1742 (1947),
3. California v. Lo-Vaca Gathering Co., 379 U.S. 366, 85 S.Ct. 486, 13 L.Ed. 2d 357 (1965), and
4. F.P.C. v. Amerado Petroleum Corp., 379 U.S. 687, 85 S. Ct. 632, 13 L.Ed. 2d 605 (1965).

Herein, however, sales are made of gas which never crosses a state boundary from production thereof to consumption. Therefore, this case brings before the Honorable Court an example of *traditional intrastate sales* of natural gas.

We would direct the Honorable Court's attention to two provisions of the Natural Gas Act. Section 1(b) of the Act provides as follows:

> "The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to *any other* transportation or *sale* of natural gas or to the local distribution or to the facilities used for such distribution or to the production or gathering of natural gas." (Emphasis added.)

Section 2(7) of the Act provides as follows:

> "'Interstate commerce' means commerce between any point in a state and any point outside thereof, or between points within the same state but through any place outside thereof, but only insofar as such commerce takes place within the United States."

Nowhere in the Natural Gas Act is there provision for Federal Power Commission jurisdiction over "intrastate" gas which travels within a state for a time with additional gas eventually destined for consumption outside of the state, nor is there any definition so encompassing of "interstate commerce," nor has the United States Supreme Court ever held such "intrastate gas" to lose its "intrastate" characteristic merely by association. Indeed, natural gas lends itself

primarily to pipeline transport; and essential business practices demand that there be no duplication of facilities for handling of "intrastate" and "interstate" gas.

Although this Court stated in the *Lo-Vaca Gathering Company Case* that "the result of our decision is to make the sale of gas, which crosses a state line at any stage of its movement from well-head to ultimate consumption, in interstate commerce within the meaning of the act," the Court of Appeals restated the "entire transaction" doctrine found in said case as follows:

> "The mixing of intrastate gas with a substantial portion of interstate gas for pipeline transportation in one commingled stream gave the Commission jurisdiction 'at the outset over the entire transaction.'"

The "entire transaction" referred to by this Court in the *Lo-Vaca Gathering Company Case* certainly only encompasses the sales at issue by that company and Houston Pipe Line Company to El Paso Natural Gas Company, and not subsequent sales to distributors made at a point farther along the pipeline, like the sales by United Gas in the instant case. As set forth in the *Lo-Vaca Gathering Company Case,* the reason for Federal jurisdiction is "the fact that part of the gas will be resold" and not the fact of commingling of intrastate and interstate gas.

The gas in question in the Lirette-Mobile Line moves solely within one state, the State of Louisiana, is produced in Louisiana fields, is transported solely within Louisiana and is sold solely in Louisiana. Clearly, these sales do not involve "commerce between any point in a state and any point outside thereof" within the terms of section 2(7) of the Natural Gas Act, but only com-

merce between two points in the same state. As pointed out by Commissioner O'Connor in his dissenting opinion, reports from the House and Senate Committees both stated that the provisions of the Natural Gas Act defining interstate commerce were "self-explanatory." The only self-explanatory interpretation of "commerce between any point in a state and any point outside thereof" is one which is confined to exactly those events. Commerce between two points in the same state, including the disputed sales of gas herein, is clearly not within such a definition of interstate commerce.

The explicit purpose under the Natural Gas Act not to interfere in any manner with constitutional state regulations is recognized by decisions of this Honorable Court, in which it has been held that the Act had "no purpose or effect to cut down State power" and that the Act is to "aid in making State regulation effective" and was drawn "with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way."[1]

Moreover, the predominant theme of the legislative history is that Congress, by the Natural Gas Act, did not intend to give the Federal Power Commission the fullest power possible under the Commerce Clause of the Constitution, but rather intended merely to "plug the gap" left by certain decisions prior to 1939.[2]

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[1]Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954); Panhandle Eastern Pipe Line Co. v. PSC, 332 U.S. 507 (1947); F.P.C. v. Hope Natural Gas Co., 320 U.S. 591, 610 (1944).

[2]H. R. Rep. 709, 75th Cong., 1st Sess., pp. 1-2, S. Rep. 1162, 75th Cong., 1st Sess., pp. 1-2; the relevant decisions being Pennsylvania Gas Co. v. Public Service Commission, 252 U.S. 23 (1920); Missouri v. Kansas Natural Gas Co., 265 U.S. 298 (1924); Public Utilities Commission v. Attlebore Steam & Electric Co., 273 U.S. 83 (1927).

The gap referred to was a regulatory vacuum created by Supreme Court decisions holding that in certain circumstances the states were constitutionally powerless to regulate sales of gas. Each of these cases reversed an attempted regulation by a state of gas which came from beyond that state or which was destined beyond its borders. This was the only regulatory gap which Congress intended to fill and beyond which Congress explicitedly stated that the power of the Federal Power Commission was not to extend.

Clearly, gas sold by United Gas Pipe Line Company which is produced, transported, sold and consumed all within one state does not come within the definition of interstate commerce contained in the Natural Gas Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for Writ of Certiorari by Louisiana Public Service Commission should be granted and the judgment of the court below should be reversed.

Respectfully submitted,

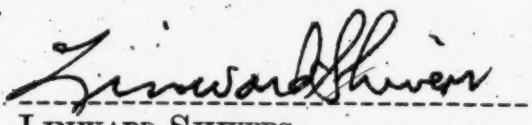
STATE OF TEXAS
RAILROAD COMMISSION OF TEXAS

WAGGONER CARR
Attorney General of Texas

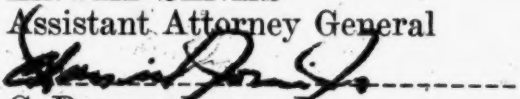
HAWTHORNE PHILLIPS
First Assistant Attorney General

T. B. WRIGHT
Executive Assistant

J. ARTHUR SANDLIN
Assistant Attorney General



LINWARD SHIVERS
Assistant Attorney General



C. DANIEL JONES, JR.
Assistant Attorney General

Box R, Capitol Station
Austin, Texas 78711